



Wills: Requirements and Considerations

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Note: This publication is intended to provide general information about legal issues. It should not be cited or relied upon as legal authority. State laws vary and no attempt is made to discuss laws of states other than Oklahoma. For advice about how these issues might apply to your individual situation, consult an attorney.

Consequences of Dying Without a Will

When someone dies without a will, the distribution of property is controlled by state statutes. These statutes vary somewhat from state to state. In Oklahoma, the statutes require the distributions shown in Table 1, depending upon which survivors remain. If no relatives survive, the estate will go to the state treasury rather than to a friend or some worthy charitable cause as the decedent (person who died) might have preferred. These statutes do not allow any room for flexibility to meet changing circumstances or special needs. Even if these distribution schemes appear to be satisfactory, it may still be desirable to have a will. The statutes are always subject to change and you may not always be aware of changes when they occur. In addition to initial distributional considerations, several other factors may make a will desirable.

Absence of a will prevents the decedent from placing any restrictions on future ownership of property. Once children reach legal age, they will receive their shares with no restrictions. If the surviving spouse remarries, the new spouse may inherit one-half of the assets left by the first spouse. If that occurs, children of the first spouse may not benefit from those assets.

Where minor children survive, the absence of a will may require a considerable amount of oversight from the court to protect the children's interests. The surviving spouse will be required to report to the probate court and account for expenditures of the children's share of estate assets. The spouse may also have to post a bond to guarantee proper handling of the children's property until they reach legal age. Bonding companies charge a fee for posting bonds. The children in such situations are given a right to demand a financial accounting when they reach legal age. This represents a potential source of friction, money fees and liability for the surviving spouse.

Failure to leave a will also prevents input from the decedent concerning choice of guardian for minor children. The court will normally appoint a close family member to serve as the guardian, but that individual may not be the most suitable person. Additionally, the selection process may lead to unnecessary family controversy.

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Court costs will usually be higher if an individual dies without a will (intestate). The estate administrator will be required to post a bond. As mentioned previously, the guardian of minor children will have to obtain court approval for most actions and may also have to post a bond. The bonds guarantee that the guardian and administrator will faithfully carry out required duties. Such bonds may be obtained by paying a fee to a bondsman. Absence of a will also precludes opportunities for minimization of state and federal inheritance taxes.

Finally, when individuals die without wills, all of their property, real or personal, may be sold for payment of their debts. These decedents have no control over which property is sold first to pay debts and which property is to be retained for the heirs.

Will Substitutes

To some extent, individuals may, if they choose to do so, achieve the property transfer function of wills through other devices. An *inter vivos* (lifetime) trust may be established with directions as to when and how the property should be distributed. Alternatively, ownership of property in joint tenancy with right of survivorship will transfer ownership to the surviving joint tenant(s) upon the death of one owner. Another alternative is to establish a life estate and deed a remainder interest to someone else. The owner of a life estate (life tenant) has a right to use the property as his own during his lifetime. When the life tenant dies, the owner of the remainder interest will automatically become the full owner.

All of these alternatives involve disadvantages. Life estate and remainder interests are difficult to sell or mortgage if the need arises. Also, conflicts may arise between the life tenant and the remainder interest owner concerning how the property is used. Once a life estate or joint tenancy is created, there is no opportunity to change your mind. Nor is there any flexibility or opportunity for modifying an irrevocable trust. In addition to the potential conflicts and lack of flexibility offered by these will substitutes, a further disadvantage results from the fact that the life estate and joint tenancy options do not achieve any functions of a will other than property transfer (such as naming a guardian, disposing of insurance proceeds if named beneficiaries did not survive, and tax management.) Consequently these alternatives are not perfect will substitutes.

A further discussion of life estates, joint tenancies, and other estate planning options may be found in Extension Circular 726 "Estate Planning", available at county extension offices as well as being available through the OSU Fact Sheet Website.

Requirements for Validity of a Will

Generally, wills must be written, formally signed and witnessed in order to be valid. The required number of witnesses varies from state to state. In Oklahoma, at least two witnesses are required. Witnesses should actually see the maker of the will (testator) sign the will and the witnesses must sign while the testator is present. The witnesses should be told that they are witnessing the testator's will, although they do not need to know what the will says. Heirs under the will should not be used as witnesses. Beneficiaries are generally not permitted to receive property under a will they have witnessed unless there are sufficient other witnesses.

In certain limited situations, oral wills may be valid. Oral wills, called nuncupative wills, are only valid when made by a person in military service and in fear of immediate death related to the military service. The estate cannot exceed \$1,000 and cannot include real estate. At least two witnesses must be able to establish not only that an oral will was made, but also the contents of the will. Consequently, oral wills have very little practical usefulness.

If a will is written and signed but not witnessed, it may still be valid if it is written, dated and signed entirely in the testator's handwriting. Such wills, called holographic wills, are valid because the handwriting helps to ensure that the document represents the will of the testator. However, the law is very strict concerning how such wills are created. The will may be invalidated if any of it is typed or not written in the testator's handwriting.

Regardless of the type of will which is chosen, the testator must be of legal age, must be mentally competent, and must be free from fraud, duress, or undue influence which might affect will provisions. In Oklahoma, individuals must be at least 18 years old to make a valid will. Adequate mental competence is more difficult to define. Generally, courts consider factors such as whether the testator recognizes the existence of individuals who would normally be named as heirs, whether the testator has a reasonable conception of what property he or she owns and whether the testator is capable of formulating some plan as to how the estate property should be distributed. There is no requirement that the plan take any particular form or that typical heirs be included as long as it appears that there was some plan and that these family members were not accidentally excluded. Mere idiosyncrasies and even some mental illnesses may not necessarily invalidate a will if the individual was lucid when the will was written or if the mental problems did not affect the distribution in the will. If there is doubt about the mental competence of an individual who wants to make a will, it may be desirable to obtain a court determination of the individual's competency.

If mental competence is challenged during probate or if fraud, duress or undue influence issues are raised, witnesses to a will are usually able to testify concerning these issues; however, in the case of a holographic will, there are no witnesses. Competency and voluntariness may be proved by other evidence and testimony of individuals who knew the

testator, although this is generally not as reliable as testimony of witnesses who actually witnessed the execution (signing) of the will.

Generally, a formally signed and witnessed will, drafted by an attorney, is recommended. Because oral and holographic wills are subject to strict scrutiny by courts, they create risks which should be avoided. Additionally, since they generally do not involve consultation with an attorney, problems of interpretation and failure to understand the legal consequences of will provisions may result.

Many formally-executed wills use a self-proving clause. Such wills are sometimes called self-proved wills. The self-proving clause is a notarized statement, signed by the witnesses, which indicates that the will was properly executed and signed. The use of this clause at the end of the will avoids the necessity of having the witnesses appear in court when the will is probated as long as the will is not contested.

Pros and Cons of Do-it-Yourself Wills

There are many options available for individuals who want to write their own wills. Will kits or will forms and do-it-yourself books are available. Computer software is also available for drafting a will. Advantages and disadvantages of using these alternatives are discussed below.

Pros:

- a. Use of will kits and will forms may save some initial cost. However, will kits, will forms, and do-it-yourself books still involve some expense, but this is typically less than the cost of hiring an attorney to draft a will.
- b. A do-it-yourself will allows complete privacy. However, attorneys are trained and ethically bound to maintain confidentiality of client information, so your privacy should be carefully guarded in any event.

Cons:

- a. Potential problems may arise concerning interpretation of your will after your death. These problems may result from the use of unclear words or from a failure to understand the legal implications of the will clauses.
- b. Potential failure to follow correct procedures, such as obtaining the correct number of witnesses and having them witness in the correct manner is another problem.
- c. You may forget to include some important provisions.
- d. A form will is not tailored to your specific needs.
- e. You may not be aware of all of the tax implications of your estate plan. An attorney might be able to help you save money on estate taxes. The savings may greatly exceed the cost of the advice.

Considerations in Making a Will

Regardless of the type of will used, there are certain issues which should be resolved by the testator. It is helpful to consider some of these issues before consulting an attorney in order to make efficient use of the attorney's time and minimize expenses. Couples may wish to discuss some of the issues so that a plan is developed to best meet the needs of the surviving spouse. Some attorneys provide an initial questionnaire to clients who seek estate planning as-

sistance. Other attorneys may ask for the information in a conference with the client. In either case, some advance planning may help to make the best use of the attorney's skill and assistance. In some cases, you may wish to consult your attorney concerning the implications of alternative decisions. The following list contains a discussion of items that should be considered when creating a will.

- 1. What property do you own?** An inventory should be made and updated periodically. This inventory should indicate who is listed as the owner on deeds and other title documents. If ownership is held jointly by more than one person, the type of co-ownership should be noted. If ownership is restricted to less than full ownership, such as a life estate, such restrictions should be noted. Estimates of the value of the property should also be made and up-dated periodically.
- 2. What is your distribution plan?** A list of heirs should be made along with designations as to what property should be distributed to each. Do you wish to specify present and future ownership rights, such as life estates and remainders, or otherwise restrict ownership interests? Do you wish to give specific items to certain individuals?
- 3. Which gifts are most important?** Statutes govern which property is used first to pay debts and gifts under the will and what happens if there are insufficient assets to make some transfers designated in the will. The will may override these statutes if that is desired and if the necessary language is included. Expenses of administration and family living allowances are paid before any debts are paid.
- 4. Do you wish to place any restrictions on when or how your heirs receive their inheritance?** If so, you may need a trust. Consolidating assets in a trust can avoid the need for appointment of a guardian of property of minor children if neither parent survives.
- 5. If a trust is established, how much discretion and authority do you wish to give the trustee?** Who should serve as trustee? Do you have a second choice in case the designated trustee is not available?
- 6. Are gifts to individuals important?** Gifts to individuals should ordinarily be conditioned on the receiver surviving the testator for a minimum amount of time. This prevents the property from being subject to two probate procedures and possibly imposition of two inheritance taxes. It also allows the testator to control what will happen to the property in that situation, rather than leaving that to be handled by the deceased heir's will.
- 7. What if the property no longer exists at death?** This is particularly a problem if the gift is specific property, such as a particular necklace or vase. Do you wish to make an alternative gift? Failure to designate an alternative will mean that the heir will receive nothing if the specific item is not available. If the property is stock, the will should specify how stock splits, stock dividends, and mergers or reorganizations should affect distributions.
- 8. How do you want to handle mortgaged property?** If property is mortgaged, do you want it transferred subject to the mortgage or do you want the debt paid out of other estate assets? This will influence the amount of assets inherited by various heirs.
- 9. Will you need a guardian for minor children?** If so,

do you want a different person to manage the children's money? How much authority do you want the guardian to have? Do you want the court to closely supervise the guardian's actions? Do you want the guardian to be required to post a bond?

- 10. An executor should be named.** The executor manages the estate administration, files necessary legal documents and tax returns, and handles sales and transfers of property according to will provisions. Because this position involves important responsibilities, great care should be taken in selecting a person capable of performing the required duties. The executor will probably work closely with an attorney in order to ensure that all legal requirements are satisfied. One or more back-up executors should be named in case the first person is not available or capable to serve as executor. Co-executors may be named but this may complicate the administration process, especially if they do not work well together or are separated by long distance. What powers do you wish to give the executor(s)? Do you want the executor(s) to be required to post a bond? This helps to protect the heirs' assets but increases the cost of administration. Do you want the estate to pay a fee for the service of the executor(s)? A family member may be willing to serve without fee. However, if significant time and effort is required and there are other heirs, a fee may be desirable in order to compensate the executor for the time required to administer the estate. Executors always have the right to decline to accept a fee if a fee is specified.
- 11. What about funeral and burial arrangements or donation of organs?** Directions regarding funeral arrangements, burial or donation of organs should be included in a separate document that is more accessible. Wills often are not read until after the funeral. A responsible family member should be told that these directions exist and where to locate them. Organ donation may require additional advance arrangements. You may wish to check with a medical facility to see what steps are recommended.
- 12. Is there a need for a contractual will?** Contractual wills are wills made under a contract. For example, a husband and wife might make individual wills that leave property to the surviving spouse and that contain promises that the will provisions will not be changed. They may also attempt to restrict the survivor's right to dispose of property. A high potential exists for lawsuits seeking to invalidate contractual will provisions after the death of one spouse. Trusts generally offer a better method of accomplishing similar objectives.

Making Changes in Will Provisions

Wills should be periodically reviewed to determine if any changes should be made. It is particularly important to consider making changes to a will when significant family changes occur such as births, deaths, divorce or marriage. Other gradual changes in circumstances, such as advancing age of guardians, changing composition of the estate, or changing needs of heirs may also create a need for adjustments in the will.

One method of changing a will is to write a new will that includes a statement revoking all prior wills. If the new will does not include such a statement, the court may try to implement both wills to the extent the provisions are not totally inconsis-

tent. This can lead to considerable confusion, and potentially costly court conflicts that may reach a different result than the decedent intended.

If only a few changes are desired, another alternative is to draft a codicil to the original will which states the desired changes. The codicil must be signed and witnessed with the same formalities as required for a will. Additional codicils may be added as additional changes are required. Use of codicils is a fairly common method of modifying a will, but if quite a few changes are made over time, it may eventually be desirable to draft a new will.

It is not generally advisable to make changes on the face of an existing will by crossing out old terms or writing in new terms. Attempts to make such changes may actually invalidate the will and probably not accomplish what the testator intended.

Limitations on the Effectiveness of Wills

Wills only control distribution of property that is included in the estate. Property held under certain types of ownership is not included in the estate and thus is not affected by will provisions. For example, property owned in joint tenancy with right of survivorship automatically passes to the surviving joint tenant at death and is not distributed under the will. Similarly, a life estate interest in property automatically terminates at death. If property is owned as tenancy in common, the decedent's share is transferred by will and the other owners continue to own their respective shares.

Life insurance proceeds may or may not be transferred by will depending on who is named in the policy as beneficiary. Generally, life insurance proceeds will not be affected by will provisions unless the estate is named as beneficiary in the policy or all the named beneficiaries are no longer living.

Wills may not take precedence over an antenuptial agreement which promised the surviving spouse a certain share of the estate. Wills also may not be used to exclude a spouse from inheriting at least as much property as the spouse would inherit under state statutes if there was no will (see Table 1). If the will leaves less than the designated spousal share, the spouse may choose to accept the share designated in the will or may instead demand an intestate share specified under state statutes. There is no similar requirement that children receive anything under the will. However, if children are excluded, that intention should be specifically stated. Otherwise, the probate court might believe the children were inadvertently omitted and might grant the omitted children intestate shares shown in Table 1. If the spouse or children are awarded an intestate share, the will still controls the distribution of the remaining property, to the other heirs.

Is It Necessary to Probate a Will?

Wills cannot take effect unless the probate process is initiated. In some cases, if property is held in joint tenancy or as a life estate or intervivos trust, probate may not be absolutely necessary.

Individuals often express a desire to avoid probate. This is probably based upon concern about the cost and potential publicity of a probate proceeding. Whether or not it is desirable to avoid probate depends upon the circumstances of the

individual situation. In making that determination, individuals should consider the following:

1. Cost and delay created by the probate procedure may be relatively small if the estate is small and simple.
2. Probate cuts off the claims of creditors if they are not filed within a limited time. This is especially important if the decedent was engaged in business or professional activities that might have created potential future liabilities.
3. Family awards and allowances generally insulate a small amount of property from creditors' claims. This may be useful if estate debts are approximately equal to the total value of the estate.
4. Clear title to assets owned by the decedent alone or as a tenant in common may not be obtained unless some sort of estate administration is conducted. This is particularly important in the case of real property, bank accounts, and vehicles with title registrations.
5. Oklahoma statutes require that individuals who have possession of a will must deliver the will to the probate court or to the executor named in the will within 30 days after they learn that the testator is dead. The penalty for failing to deliver the will is liability for resulting damages to beneficiaries named. Damages might include lost use of the property, lost interest, or subsequent destruction of the property. If the heirs named in the will have possession of the property, this may not pose a significant problem.

Other Estate Planning Publications

1. "Estate Planning," Extension Circular E-726
2. "Trusts," OSU Extension Fact Sheet AGECE-771
3. "Probate," OSU Extension Fact Sheet AGECE-773

Glossary of Terms

Administrator/Administratrix – Individual(male/female) assigned to manage the estate settlement process if no will exists.

Antenuptial – Determined or made before marriage (prenuptial).

Codicil – Signed and witnessed document which specifies changes in a will.

Decedent – Person who died.

Executor/Executrix – Individual (male/female) appointed in a will to manage the estate settlement process.

Guardian of the Person – Individual assigned to care for minor children or adults who cannot care for themselves.

Guardian of the Property – Individual assigned to manage the property of minor children or incompetent adults.

Intervivos trust – Trust that takes effect during the lifetime of the trust's creator.

Intestate – Someone died without leaving a will.

Life estate – Ownership that entitles the holder to lifetime use of the property. This life estate may be mortgaged or sold but only entitles the owner to use during the lifetime of the original designated individual.

Remainder – Ownership that entitles which entitles the holder to full ownership upon death of the life tenant

Testate – Someone died leaving a will.

Testator – The individual who made the will.

Table 1. Distribution of property in Oklahoma when someone dies without leaving a valid will.

Surviving Heirs	Distribution
<p>Spouse—Decedent</p> <p style="text-align: center;">Case 1. Spouse No children No parents</p>	<p>Spouse inherits everything.</p>
<p style="text-align: center;"> Mom — Dad Spouse — Decedent Child 1 — Child 2 </p> <p style="text-align: center;">Case 2. Spouse Children Parents</p>	<p>Spouse inherits 1/2 Children share 1/2 (regardless of number of children)</p>
<p style="text-align: center;"> Spouse — Decedent Child 1 — Child 2 — Deceased child Grandchild 1 — Grandchild 2 — Grandchild 3 </p> <p style="text-align: center;">Case 3. Spouse 2 living children 1 Deceased child 3 Grandchildren</p>	<p>Spouse inherits 1/2 children share 1/2 (1/2 divided by 3 equals 1/6 each) Children of deceased child will divide that share (1/6 divided by 2 equals 1/12 each) Other grandchildren receive nothing.</p>
<p>Grandparents</p> <p style="text-align: center;"> Mom — Dad Spouse — Decedent — Sister </p> <p style="text-align: center;">Case 4. Parents Grandparents Spouse</p>	<p>Spouse receives all joint-industry property and 1/3 of nonjoint property. Parents receive 2/3 of nonjoint property. If parents are deceased, sister would receive 2/3 of nonjoint property.</p>
<p style="text-align: center;"> Spouse — Decedent Child 1 — Child 2 — Child 3 </p> <p style="text-align: center;">Case 5. Spouse Decedent's children (Not children of spouse)</p>	<p>Spouse receives 1/2 of joint industry property. Children share 1/2. Spouse receives child's share of nonjoint property (1/4 in example). Children each receive share of non-joint property (1/4 in this case).</p>
<p style="text-align: center;">Case 6. No relatives</p>	<p>The estate escheats to the state.</p>

*Joint industry property is property acquired by joint efforts during marriage (including individual salaries). Nonjoint property might include individual inheritances or property owned before marriage if that property is held in separate bank accounts or otherwise maintained as separate property.

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Extension carries out programs in the broad categories of agriculture, natural resources and environment; family and consumer sciences; 4-H and other youth; and community resource development. Extension staff members live and work among the people they serve to help stimulate and educate Americans to plan ahead and cope with their problems.

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- The federal, state, and local governments cooperatively share in its financial support and program direction.
 - It is administered by the land-grant university as designated by the state legislature through an Extension director.
 - Extension programs are nonpolitical, objective, and research-based information.
 - It provides practical, problem-oriented education
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 - It utilizes research from university, government, and other sources to help people make their own decisions.
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